A NOTE ON PRACTICE RELATING TO THE FILINGS OF PROOF OF CLAIM FORMS AND OBJECTIONS TO CLAIMS IN THE MIDDLE DISTRICT OF ALABAMA

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I. INTRODUCTION

Objections to claims are some of the most frequently litigated contested matters in this Court. For many years, it has been the practice of this Court to set all objections to claim for hearing.[1] Over 90% of these matters are resolved by default. Given the number of these matters and the Court's increasing case load, it has become inefficient to set all objections to claim for hearing. The Court will change its procedure and resolve these objections through a negative notice procedure. Upon the filing of a properly documented objection, the Court will enter a negative notice order, sustaining the objection unless a response is filed within 30 days. Objections to claim which are not properly documented will be dismissed.

Several weeks ago I published a monograph on motion practice in this Court. A number of practitioners have given me comments which have been very helpful. In an effort to improve the practice of law in this Court, I am publishing this memorandum to provide guidance on the filing of proofs of claim and objections to claims. I will divide my remarks into two parts. First,

[1] Judge Williams recently has been disposing of objections to form by negative notice, while setting all objections to the substance of claims for hearing.

I will discuss the preparation and filing of proof of claim forms. Second, I will discuss procedures for making objections to claims.

II. FILING PROOFS OF CLAIM

With the exception of creditors who are properly listed on the schedules filed by a debtor in a case under Chapter 11, one who is owed money by a debtor in bankruptcy must file a Proof of Claim if she hopes to get paid.[2] Therefore, the timely and accurate filing of a proof of claim is critical. First, the claimant should obtain a Proof of Claim form which is designated Form No. 10 of the Official Forms prescribed by the Judicial Conference of the United States. In most instances, the Court will send creditors a proof of claim form with the Notice of Commencement of Case. In addition, a link to a complete set of the Official Forms is provided on the Court's website. If a proof of claim form is not received from the Court, creditors may download the form from the Court's website.

We have recently converted to an electronic case filing system (CM/ECF) in which pleadings, papers and claims may be filed electronically through the internet. Those who are interested should contact the Clerk's Office and reserve a place in a training session. Once a username and password are assigned, creditors may file claims electronically. Those who are already using the CM/ECF system in other courts may be able to obtain a username and

[2] Creditors in "no-asset" Chapter 7 cases are asked not to file proof of claim forms unless the Trustee locates sufficient assets to generate funds which could be distributed to creditors.

password without attending a training session. I urge all creditors who file large numbers of claims to file electronically.

The following is a description of the most common errors made in the preparation and filing of proofs of claim in this Court. I offer this discussion not as a complete practice guide, but rather as guidance on how to avoid common problems in this area. For a more complete discussion the reader should consult a treatise.

A. FAILURE TO COMPLETE PROOF OF CLAIM FORM

A surprising number of claims are disallowed because the claimant failed to complete the proof of claim form. Such flaws include the failure to sign the form and the failure to supply an amount owed. Before filing, the claimant should carefully review the form for completeness and accuracy.

B. FAILURE TO PROVIDE PROOF OF SECURITY INTEREST

A creditor who contends that her claim is secured by virtue of a security interest must provide proof of the perfection of her security interest. FED. R. BANKR. P. 3001(d). The nature of the proof required depends upon the requirements for perfection of a security interest in the underlying collateral. For example, if the collateral is an automobile, a copy of a certificate of title showing a valid lien should be provided. If the collateral is real property, a copy of the mortgage which shows the filing information should be provided. If the documentation is voluminous, a summary may be provided. However, it is a good idea to provide a copy of the front page of the instrument which contains information as to the date and place of filing.

C. IMPROPER CLAIM OF PRIORITY STATUS

Priority claims, which are described in detail at 11 U.S.C. § 507, are paid before other claims. Examples of priority claims are taxes, child support, alimony and wages. Additional information on priority claims is contained in the instructions for Form 10, but a complete description of priority claims is beyond the scope of this writing. If there is not enough money in the bankrupt estate to pay all of the claims in full, priority claims are paid first, which is a considerable advantage. Unfortunately, many creditors claim priority status when they are not legally entitled to do so.[3] A creditor should not file a proof of claim form seeking a priority unless she has a good faith basis to do so.

An aspect of Form No. 10 which may be confusing is that boxes are provided to check for secured and priority claims. An unsecured claim without priority is the default condition and there is no box to check. This may lead some creditors to believe that they must check one box. This is incorrect. A creditor should not claim priority status unless her claim is one of the kinds which fit within the parameters of Section 507.

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[3] Some creditors may see claiming priority status as a "no lose" situation. In the event that no objection is made, the creditor will enjoy priority status even though she is not entitled to do so. On the other hand, if an objection is filed the creditor is relegated to the status of a general unsecured claim, which leaves her no worse off than if the claim had been filed properly in the first place. Creditors who make a practice of improperly claiming priority status and defaulting on the objection to their claim, may find their claims disallowed in their entirety.

D. LATE FILED CLAIMS

In general, a proof of claim must be filed within 90 days of the date set for the first meeting of creditors. FED. R. BANKR. P. 3002(c). The Notice of Commencement of Case will advise creditors of the claims bar date. Claims filed after the bar date are subject to disallowance. There are several very narrow exceptions to this rule, which are beyond the scope of this note. Creditors should make sure that their proofs of claim forms are timely filed or they probably will not be paid.

If a creditor does not receive a "Notice of Commencement of Case" from the Court, he should check the appropriate box on the proof of claim form. The failure to receive an official notice from the Court will not necessarily excuse a late filed claim, however, the failure to receive notice, together with other evidence may supply the necessary grounds to permit the allowance of a late filed claim. The enforcement of the claims bar date is necessary for the efficient administration of bankruptcy cases. Creditors who learn of a bankruptcy filing should file promptly a proof of claim even if they do not receive official notice from the Court.

E. FAILURE TO INDICATE AMENDED CLAIM

One of the most vexing problems in the administration of bankruptcy cases is the problem of duplicate proofs of claim. The proof of claim form contains a box to be checked if a proof of claim amends a previously filed proof of claim form. An unacceptably large number of proofs of claim forms are filed which appear to amend an earlier filed claim in which the "replace" or "amends" box is not checked. This creates confusion because it is not clear whether the claim is a duplicate, and therefore should not be allowed, or whether it is a separate claim. If

the "amends" or "replace" box is checked, it is clear that there is only one claim. When the box is not checked, the debtor or the trustee frequently objects on the grounds that one of the claims is a duplicate of the other. In the event an amended proof of claim is filed, the appropriate box should be checked. It is also a good practice to explain briefly the reason for the amendment either on the face of the claim or on an attachment.

In the future, if two or more proof of claim forms are filed by the same creditor, the Court will presume that the later-filed proof of claim form was intended to supercede the earlier filed proof of claim, unless it appears on the face of the form that other treatment is appropriate. If two or more separate debts are owed by the same debtor to a creditor, the preferred practice is for the creditor to file one proof of claim form which includes all indebtedness owed. If a creditor files two separate proofs of claim forms for two separate debts, he would be well advised to explain how the claims differ and that the later claim does not supercede or amend the earlier filed claim.

III. OBJECTIONS TO CLAIM

Once a proof of claim form is filed, the claim is allowed unless an objection is filed. 11 U.S.C. § 502(a). In the past, it has been the Court's practice to set all objections to claim for hearing. Experience has shown that more than 90% of the objections are sustained by default. Therefore, the Court will implement a "negative notice" practice on objections to claims. The purpose of this note is to describe the preferred practice for making such objections. I would first note that objections to claims fall into one of two broad categories. The first category is that

which I will refer to as objections to the form of the claim. In general terms, these are objections which would not exist but for the filing of a bankruptcy case. Objections which address the kinds of issues described in Section II are examples of objections to form. The second category of objections goes to the substance of the claimed indebtedness. This kind of objection exists independently of the bankruptcy case, and absent a bankruptcy filing could be litigated in a civil action either in State Court or in Federal District Court. I will discuss each category separately, as there is a difference in how each type of objection should be made.

A. OBJECTIONS TO FORM OF CLAIM

In an objection to the form of a proof of claim, the objecting party is asking the Court to look at the proof of claim form and make a determination that it is defective on its face. For example, if a creditor claims that he holds a secured claim based upon a security interest, he must attach proof of perfection to his proof of claim form. FED. R. BANKR. P. 3001(d). If documentation is not attached to the proof of claim form and an objection is made on that basis, the Court need not look further than the proof of claim form. Objections to form are well suited to disposition on a negative notice basis.

A party making an objection to the form of a claim should allege that he is objecting to the form and set forth with specificity the basis of his objection and the requested disposition. For example, in the case of a claim which does not contain proof of perfection of a security interest, the relief requested would be that the claim should be allowed as unsecured in the amount filed. The objecting party should not make the Court guess as to the proper disposition

of the claim. This is particularly important in cases in which the objection is based upon several independent grounds.

Counsel should remember that an objection to claim is a contested matter and must be served in accordance with Bankruptcy Rules 9013-14 and 7004. Service upon the creditor at the address indicated on the Proof of Claim form may not be sufficient. On March 9, 2000, Judge Massey from the Northern District of Georgia published a monograph on service in bankruptcy cases. A copy is available both on this Court's website as well as the website for the United States Bankruptcy Court for the Northern District of Georgia. Counsel should ensure that objections to claim are properly served.

B. OBJECTIONS TO THE SUBSTANCE OF A CLAIM

The second category of objections to claim encompasses those which I refer to as objections to the substance, or merits, of the claim. This kind of objection could be litigated even if there were no bankruptcy proceeding as the objection is not to the form of the claim, but rather to the validity of the underlying indebtedness. Examples of this kind of objection are: (1) the debtor does not owe the debt; (2) the debtor has not been given credit for payments made; (3) interest has been incorrectly calculated or charged; or (4) the debtor owes an amount less than the amount claimed. The primary difference between the litigation of this type of objection and objections to form is that extrinsic evidence is necessary to prove the merits of an objection to substance, whereas an objection to form can be determined solely by reference to documents in the Court's record.

The Court will also resolve objections to the substance of a claim by negative notice. However, two problems must be addressed in resolving this kind of objection by way of a negative notice procedure, one of which is theoretical, the other practical. As for the theoretical problem, a proof of claim is prima facie evidence of the validity of the claim and must be overcome by evidence. The propriety of permitting counsel to proffer facts, which he cannot substantiate absent a witness, is troubling.[4] This gives rise to a practical problem. Many creditors fail to defend their claim not because their claim lacks merit, but rather because it is not economically feasible to litigate the merits of their claim. All lawyers who practice regularly in bankruptcy courts understand these dynamics. Most of the lawyers who practice in this Court do not unfairly take advantage of this situation and object only when they have a good faith basis to do so. However, there are a troubling number of lawyers who file objections without any basis in fact, playing the percentages that the creditor is not likely to show up to litigate the matter. In those situations when the creditor does appear, the unethical lawyer will concede his objection without a fight because he knows that his objection did not have any merit in the first place.

In an effort to resolve this dilemma, the Court will require an affidavit, or declaration, from the debtor, or a person with first hand knowledge of the facts, supporting the merits of the objection. The objection should have an affidavit attached to it. The Court will enter a "negative notice" order sustaining the objection unless a response is filed within 30 days of the date of the order. If no response if filed by the creditor, no further order will be entered by the

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[4] In the past, this Court has permitted counsel for the objecting party to proffer facts without a witness or other evidence. In the future, counsel must provide either an affidavit or a declaration to overcome the presumption of validity of the proof of claim form. In the alternative, counsel may call a witness. The undersigned will no longer accept a proffer of facts.

Court. Therefore it is important that the objection set forth the proposed disposition. Examples of possible dispositions are: (1) the claim is disallowed in its entirety; (2) the claim is allowed in the amount of _____; (3) the claim is reduced to the amount paid.

Counsel should bear in mind the provisions of 28 U.S.C. § 1746, which provide that declarations may be made without a notary public. At the bottom of the declaration, the following language should be used, "I declare under penalty of perjury that the foregoing is true and correct. Executed on (date)." Therefore, it is not necessary for the debtor to appear before a notary public to create a sworn document. The burden on the debtor is therefore minimal and the Court is given assurance that the objection is supported by some probative evidence.

When a response is filed, the Court will set the matter on a motion docket. Therefore, it will be one of several dozen matters on a "cattle call" type of docket. If the matter can be disposed of in 15 minutes or less, the Court may hear evidence and argument of counsel. One problem with contested objections to claim is that the dispute may be a minor matter which can be heard in a short time or a complex matter which may require hours or even days of to hear evidence. The complexity of the dispute is not always apparent from the face of the pleadings in the Court's file. The Court expects that counsel will communicate with one another in an effort to resolve their dispute. If the dispute cannot be settled, counsel are expected to cooperate with one another and come to an understanding as to what is necessary to prepare the dispute for trial. If a matter appears to be complex, the Court will treat the initial hearing as a pretrial hearing and specially set an evidentiary hearing on the objection for a later date when the Court can devote sufficient time to hear the evidence. Counsel should not show up at an initial hearing with a dozen witnesses in tow and expect to consume an entire day presenting evidence unless he has

discussed the matter in advance with opposing counsel and chambers staff. On the other hand, counsel should not request an evidentiary hearing merely for purposes of delay.

Objections to claims are among the most frequently filed contested matters in this Court. Through the hard work and professionalism of the counsel who regularly appear in this Court, the vast majority of these may be resolved expeditiously, without unnecessary expense and delay. Counsel should respond promptly to telephone calls and correspondence. Reasonable requests for documents and information should be honored promptly without the necessity of formal discovery. "Scorched earth" litigation is greatly disfavored and may subject counsel to sanctions.

IV. SUMMARY

This Court is changing its procedures for the disposition of objections to claims. All objections should state with particularity their grounds for relief and the relief requested. Objections to the substance of a claim should be supported by an affidavit or declaration. In most cases, the Court will enter a "negative notice" order sustaining the objection unless a response is made within 30 days. If no response is made, the Court will take no further action as the objection is sustained pursuant to the terms of the negative notice order. If a response is made by the creditor, the matter will be set for hearing. Counsel should cooperate with one another to insure the just, speedy and inexpensive disposition of all such matters.